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Rosli bin Shaik Yahaya v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–113 OF 2007
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
11 AUGUST 2010

C

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a), (2) — Trafficking in dangerous drugs — Whether overwhelming evidence established against accused — Whether trial judge properly evaluated defence — Prosecution's failure to call witness, effect of — Whether evidence of agent provocateur testifying for prosecution ought to be corroborated — Whether evidence admissible

D

Evidence — Adverse inference — Failure of prosecution to call witness — Whether material witness — Whether witness an agent provocateur — Whether adverse inference ought to be drawn against prosecution — Evidence Act 1950 s 114(g)

E

Evidence — Agent provocateur — Admissibility of — Whether evidence of agent provocateur in drug trafficking case required corroboration — Whether evidence admissible — Dangerous Drugs Act 1952 s 40A(1)

F

In an anti-drug trafficking operation mounted by the police, PW4 had asked one Man whether he could supply him ('PW4') with cannabis. Man gave him a telephone number of his friend who could supply the cannabis. PW4 called the number — later confirmed to be registered to the appellant's wife and used by the appellant — and spoke to the appellant. PW4 and the appellant then entered into negotiations for 5kg of 'supply'. The appellant was arrested when transporting the drugs for the purpose of delivering the same to PW4. From the front carrier basket of the motorcycle the appellant was riding, police seized a plastic bag containing five slabs of substance later confirmed to be cannabis. The appellant was charged, convicted and sentenced to death by the High Court for trafficking in 4,645g of cannabis contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), read with s 39B(2) of the same. He appealed to the Court of Appeal. On appeal, counsel contended that: (i) the judge had erred in calling the appellant to enter his defence because there was no evidence that the appellant had negotiated a deal to supply drugs or cannabis to PW4; (ii) the adverse presumption under s 114(g) of the Evidence Act 1950 ought to be invoked against the prosecution for not calling Man to

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give evidence; and (iii) PW4's evidence as an agent provocateur ought to be corroborated.

Held, dismissing the appeal:

(1) Man had only given the appellant's phone number to PW4. Man was never involved in the negotiations for the sale of the drugs between PW4 and the appellant. An adverse inference could not be drawn against the prosecution because Man was not a material witness in the prosecution's case. He was also not an agent provocateur (see paras 24–25); *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 referred.

(2) There was no requirement for PW4's evidence as an agent provocateur to be corroborated. His evidence was admissible pursuant to s 40A(1) of the DDA (see para 26); *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 referred.

(3) It was clear from the prosecution's evidence that the appellant and PW4 had negotiated over the purchase of the cannabis by PW4 whereby they agreed that the price was RM1,500 per kg. Although PW4 did not mention the word 'drugs' or 'cannabis', from the circumstances and the manner the negotiations were made between PW4 and the appellant, it could be safely inferred that the appellant was aware that he was negotiating about the cannabis. On the day he was arrested, the appellant was transporting the drugs for the purpose of delivering them to PW4. The trial judge had made the correct finding at the conclusion of the case for the prosecution that a prima facie case against the appellant had been made out (see para 28).

(4) The trial judge had properly evaluated the evidence of the appellant. The Court of Appeal would agree with the trial judge's conclusion that the defence was an afterthought. The trial judge had believed the evidence of PW4. It is trite law that the credibility of a witness is primarily a matter for the trial judge (see para 34); *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 (FC) referred; *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79 referred.

(5) There was overwhelming evidence against the appellant. Therefore the appellant's conviction ought to be sustained (see para 35).

[Bahasa Malaysia summary

Di dalam operasi anti pengedaran dadah yang dilancarkan oleh polis, PW4 telah menyoal seorang yang bernama Man sama ada dia boleh membekalkan dia ('PW4') dengan kanabis. Man memberi PW4 nombor telefon kawannya yang boleh membekalkan kanabis. PW4 mendail nombor tersebut — kemudiannya disahkan didaftarkan di atas nama isteri perayu dan digunakan oleh perayu — dan bercakap dengan perayu. PW4 dan perayu kemudiannya

memasuki perundingan-perundingan untuk pembekalan sebanyak 5kg. Perayu ditangkap apabila membawa dadah tersebut untuk tujuan menghantarnya kepada PW4. Daripada bakul pengangkut depan motorsikal yang ditunggang oleh perayu, polis merampas beg plastik yang mengandungai lima bidur bahan yang kemudiannya disahkan kanabis. Perayu didakwa, disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana mengedar dadah sebanyak 4,645g bertentangan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), dibaca bersama s 39B(2) Akta yang sama. Dia merayu kepada Mahkamah Rayuan. Atas rayuan, peguam berhujah bahawa: (i) hakim telah tersilap di dalam memanggil perayu untuk memasukkan pembelaannya kerana tidak terdapat keterangan bahawa perayu telah merundingkan perjanjian untuk membekalkan dadah atau kanabis kepada PW4; (ii) anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 patut dibangkitkan terhadap pendakwaan kerana tidak memanggil Man untuk memberi keterangan, dan (iii) keterangan PW4 sebagai ejen perangkap patut disokong.

Diputuskan, menolak rayuan:

(1) Man hanya memberi nombor telefon perayu kepada PW4. Man tidak pernah terlibat di dalam perundingan-perundingan untuk jualan dadah di antara PW4 dan perayu. Inferens bertentangan tidak boleh dibuat terhadap pendakwaan kerana Man bukan saksi material di dalam kes pendakwaan. Dia juga bukan ejen perangkap (lihat perenggan 24–25); *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 dirujuk.

(2) Tidak terdapat keperluan untuk keterangan PW4 sebagai ejen perengkap disokong. Keterangannya boleh diterima berikutan s 40A(1) ADB (lihat perenggan 26); *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 dirujuk.

(3) Adalah jelas daripada keterangan pendakwaan bahawa perayu dan PW4 telah berunding terhadap pembelian kanabis oleh PW4 di mana mereka bersetuju bahawa harga adalah sebanyak RM1,500 sekilogram. Walaupun PW4 tidak menyatakan perkataan 'drugs' atau 'cannabis', daripada keadaan dan cara perundingan-perundingan tersebut dibuat di antara PW4 dan perayu, ia adalah selamat untuk membuat kesimpulan bahawa perayu sedar yang dia berunding mengenai kanabis. Pada hari dia ditangkap, perayu membawa dadah untuk tujuan menghantarnya kepada PW4. Hakim perbicaraan telah membuat keputusan yang betul di akhir kes untuk pendakwaan bahawa kes prima facie terhadap perayu telah dibuktikan (lihat perenggan 28).

(4) Hakim perbicaraan telah menilai keterangan perayu secara betul. Mahkamah Rayuan akan bersetuju dengan kesimpulan hakim perbicaraan bahawa pembelaan adalah sesuatu yang difikirkan kemudian. Hakim perbicaraan telah mempercayai keterangan PW4. Adalah undang-undang nyata bahawa kredibiliti saksi adalah perkara

penting kepada hakim perbicaraan (lihat perenggan 34); *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 (FC) dirujuk; *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79 dirujuk.

(5) Terdapat keterangan kukuh terhadap perayu. Oleh itu sabitan perayu patut dikekalkan (lihat perenggan 35).]

Notes

For cases on agent provocateur in general, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 299–328.

For cases on failure of prosecution to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 167–179.

For cases on ss 39(1)(a), (2), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 447–489.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)

Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241; [2003] 2 AMR 404, CA (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (refd)

PP v Wan Razali Kassim [1970] 2 MLJ 79, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37, 39B(1)(a), (2)

Evidence Act 1950 ss 40(1), 40A(1), (2), 114(g)

Appeal from: Criminal Trial No 45–7 of 2003 (High Court, Taiping)

P Ravee (P Ravee & Co) for the appellant.

Shoba Venu Gobal (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hasan Lah JCA (delivering judgment of the court):

[1] The appellant was charged with trafficking in 4,645g of cannabis on 5 February 2000, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the Act. He was convicted and sentenced to death by the High Court at Taiping on 21 November 2007.

[2] The case for the prosecution as found by the learned trial judge was that PW5 (C/Insp A Aziz bin Setafa) received information on 1 February 2000 at about 9pm that there was drugs trafficking activity in Taiping. On the next day

PW5 relayed this information to PW8 (DSP Othman bin Nanyan) who was attached to the Narcotics Division of the Perak Police Contingent Headquarters.

[3] At about 6pm the same day (2 February 2000), PW8 and PW4 (D/Sjn Zainal bin Ahmad) went to meet PW5 and his informer in Taiping whereby PW5 introduced his informer to PW8 and PW4.

[4] At about 8pm, PW4 was taken by the informer on a motorcycle to a village near the Lake View Hotel in Taiping. The informer stopped his motorcycle in front of a house and PW4 saw three men in front of the house heading towards him and the informer. PW4 introduced himself as Zainal and one of the men introduced himself as Man. The informer then told Man that PW4 was his friend. PW4 asked Man whether he could supply him with cannabis and he was told by Man that he could not but that he knew of a friend who was able to. Man then borrowed the informer's handphone to call his friend and after that told PW4 that he was unable to get through to him. Man told PW4 to return the next day. PW4 went back to the rest house in Taiping and briefed PW8 on what had happened and after that they returned to Ipoh.

[5] The next day on 3 February 2000 at approximately 6pm, PW4 and one D/Kpl Saad returned to Taiping and met the informer there. PW4 was then brought by the informer on his motorcycle to Man's house and thereafter, PW4 followed Man on his motorcycle to a place called Aulong to see Man's friend who would be able to supply cannabis. On the way there, Man stopped his motorcycle at a bus stop and told PW4 to wait there as he was afraid that his friend would not trust PW4 as he did not know him. Man left PW4 there for about 10–15 minutes and after that returned to pick up PW4. PW4 asked him about his request and was informed by Man that things were settled (*beres*). After they returned to Man's house, Man gave his friend's phone number to PW4, ie 019–5777648 and gave his name as Abang Li. From there, PW4 and the informer returned to the police station and PW4 relayed what had transpired to PW8.

[6] The next day on 4 February 2000, PW4 met PW8 at his office whereby PW8 directed PW4 to call the number provided by Man. At 5.40pm, PW4 called the said number and it was answered by a woman. PW4 asked for Abang Li and after that a male voice spoke and asked 'Zainal ke ni?' and PW4 asked the man 'Abang Li ke?' PW4 then asked Abang Li about the supply (*bekalan*) that he wanted to order and was told that he did not have much in the next one or two days. PW4 informed him that he wanted 5kg and asked Abang Li to call him at his number (019–5644856) once he had obtained the supply.

[7] Ten minutes later, PW4 received a call from Abang Li who asked him to come to Taiping for a discussion the same night and to bring enough cash for the purchase of 5kg of supply. PW4 agreed to meet him at 10.30pm that night and the place for the meeting would be decided after PW4 reached Taiping. PW4 informed PW8 about this. After a meeting at PW8's office, PW4 and PW8, together with three other officers went to Taiping and checked in into room No 16 at the Happiness Hotel in Jalan Kamunting. There was a coffee stall next to the hotel and PW8 instructed PW4 to go to the stall and call Abang Li from there. PW4 promptly went to the stall and sat at one of the tables and called Abang Li on the same number and informed him of his whereabout. About ten minutes later, Abang Li called PW4 and PW4 asked him where he was. At that time a man (later identified by PW4 as the appellant) came towards him whilst on the phone and introduced himself to PW4. They exchanged greetings and had drinks at the stall. PW4 then told the appellant that he had booked a room at the hotel. The appellant suggested that they continue their discussion in the hotel room.

[8] PW4 and the appellant then went into the hotel room and PW4 asked the appellant about the supply. He also enquired about the price and was told by the appellant that it would cost RM1,500 per kg. PW4 agreed with the price. The appellant told PW4 that the supply would be delivered the next morning. PW4 then asked the appellant to get in touch with his supplier and the appellant duly spoke to someone on the phone and PW4 heard him asking what time it could be sent. PW4 asked the appellant the origins of the supply and he was told that the supply was from the north. They left the hotel room after that and PW4 went back to the police station in Taiping and updated PW8 on what had happened. PW8 had a briefing at 5am there with the rest of the members of his team and told PW4 to arrange for the handing over of the drugs at the Kamunting Toll Plaza.

[9] On 5 February 2000 at 5.45am, PW4 called the appellant to verify whether the supply had arrived and was informed that it had not and that he (the appellant) would call PW4 once the supply had arrived. At about 6.30am, while PW4 was in the car together with PW8 and some other members of the team at the car park area in the Kamunting Toll Plaza, the appellant called PW4 to inform PW4 that the supply was available and he was waiting in front of the Happiness Hotel. PW4 then told the appellant to go to the Taiping railway station. PW4 and PW8, together with the rest of the team members headed towards the railway station then. On the way there, PW4 called the appellant again to find out his location whereupon the appellant told him that he was waiting at the back of the hospital heading towards the railway station. PW4 managed to locate him and waved at the appellant and parked his car in front of the railway station. Not long after that the appellant arrived on his motorcycle and parked it at a distance of one car away from PW4.

[10] PW4 walked towards the appellant who was still sitting on his motorcycle and the appellant told PW4 to hurry up. PW4 opened a black plastic bag which was in the motorcycle front basket and saw five slabs wrapped in clear plastic. PW4 then smoked a cigarette as a prearranged signal for the raiding team to move in and thereafter the team moved in and arrested the appellant. PW5 seized a black plastic bag (exh P12A) and examined its contents and in which he found five slabs of material suspected to be cannabis wrapped in clear plastic. PW5 also seized the appellant's handphone, a motorcycle with licence plate No ABM 6061, a helmet and two keys.

[11] Upon analysis PW2 (Lam Yoke Chin), the government chemist, confirmed that the total nett weight of the five slabs of cannabis found in the black plastic package was 4,645g.

[12] PW7 (Sulaiman bin Mohamad Ali) was the registered owner of the motorcycle seized from the appellant. PW7 sold the motorcycle to the appellant in January 2000 for a price of RM900 and the ownership of the vehicle had not been transferred yet. After the sale, PW7 never used the motorcycle at all.

[13] PW12 (Nor Azimah bt Ahmad) was the former wife of the appellant. At the time of the arrest she was still married to the appellant. She confirmed that the mobile phone number of 019–5777648 was registered under her name but used by the appellant.

[14] The appellant, who elected to give evidence on oath, testified that he did not know of any person by the name of Man and this person did not come to see him on 3 February 2000. On 4 February there was a call from a person by the name of Zainal who asked to meet him (Zainal) at a stall near Hotel Happiness, Kamunting to discuss about a business deal.

[15] According to the appellant he went to see Zainal at the said stall at about 10pm. Zainal asked him whether he knew a person by the name of Dak. He told Zainal that he knew Dak whose real name was Khamis. He knew that Dak was doing business in traditional medicines. He then contacted Dak with his mobile phone and asked Zainal to speak to Dak. Zainal spoke to Dak but the appellant could not hear their conversation. According to the appellant Zainal never mentioned to him the word 'dadah' (drugs) or 'ganja' (cannabis) to him. Zainal only mentioned the word 'bekalan' (supply).

[16] On 5 February 2000 Dak called him and told him that he (Dak) wanted to send the supply to Zainal. Dak then asked him to send the supply to Zainal.

He agreed. At about 6am he went to Simpang Halt to meet Dak. Dak put a black plastic package into the basket of his motorcycle. He did not ask Dak what was inside the plastic package.

[17] He then went to Hotel Happiness to meet Zainal but Zainal was not there. He called Zainal and informed him that the supply was available. Zainal asked him to go to the Taiping railway station. He arrived at the railway station first. Zainal arrived 10–15 minutes later. He gave the plastic package to Zainal. He was arrested by the police.

[18] At the Taiping police station the police asked him about Dak and he told the police that Dak went to Matang. The police asked him to call Dak. He tried to call Dak a few times but was unsuccessful. About 15 minutes later Dak called him and he, after being told by the police of what to say to Dak, asked Dak to meet him at Simpang Halt. The police took him to Simpang Halt to identify Dak. When he arrived at Simpang Halt he saw Dak was already there. Dak was arrested by the police.

[19] The appellant said the police did not ask him whether he knew the content of the plastic package. He told the police that he did now know that the supply was drugs.

[20] The learned trial judge held that the prosecution had proved that the said cannabis was in the possession of the appellant. The learned trial judge also held that the appellant was trafficking in the drugs by transporting them to PW4 in his motorcycle. With regard to the appellant's defence the learned trial judge held that the defence was a bare denial and it had not raised any reasonable doubt in the prosecution's case. The prosecution therefore had proved its case beyond reasonable doubt against the appellant. In his judgment the learned trial judge said (pp 36–37 of the appeal record):

> Melalui keterangan SP4, SP5, SP8 dan saksi-saksi pendakwaan yang lain adalah jelas bahawa Tertuduh mempunyai milikan terhadap 5 ketul ganja seberat 4645 gram yang dirampas dari dalam raga motosikalnya. Tertuduh juga telah mengedar ganja yang berada di dalam milikan beliau itu kepada SP4 dengan cara 'transporting' dadah tersebut kepada SP4 dengan menggunakan motsikalnya tanpa menyedari SP4 adalah seorang agen provocateur.
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> Keterangan Tertuduh semasa membela diri telah gagal menimbulkan sebarang keraguan munasabah ke atas kes pendakwaan. Pembelaan Tertuduh hanyalah merupakan 'bare denial' semata-mata.
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> Dengan ini Mahkamah ini mendapati pihak pendakwaan telah berjaya membuktikan kes mereka 'beyond reasonable doubt'.

[21] As can be seen from the learned trial judge's grounds of judgment he did not invoke any of the legal presumptions under s 37 of the Act against the appellant.

[22] In his petition of appeal the appellant had raised a number of grounds of appeal. However, based on the submission made by his counsel before us, the grounds can be summarised as follows:

(a) The learned trial judge erred in facts and in law in finding that a prima facie case had been proved against the appellant.

(b) The learned trial judge failed to evaluate the appellant's defence sufficiently before rejecting it.

[23] Learned counsel submitted that the learned trial judge had erred in facts and in law in calling the appellant to enter his defence because there was no incriminating evidence whatsoever from PW4 that the appellant had negotiated a deal to supply drugs or cannabis. PW4 only mentioned the word 'bekalan' (supply) and never mentioned the word drugs or cannabis. The other person 'Man' whom PW4 said went to meet the appellant to arrange the drug deal never testified in court and whatever Man said about the appellant was hearsay. It is the contention of learned counsel for the appellant that adverse presumption under s 114(g) of the Evidence Act should be invoked against the prosecution for not calling Man to give evidence. Further, it was submitted that PW4's evidence as an *agent provocateur* ought to be corroborated.

[24] With regard to the application of s 114(g) of the Evidence Act the issue had been considered by the learned trial judge who held that the adverse inference under s 114(g) of the Evidence Act did not apply to the prosecution for its failure to call 'Man' because the role played by Man in this case was only to give the appellant's phone number to PW4. The negotiation and discussion about the supply of the drugs to PW4 was made between the appellant and PW4.

[25] From the evidence adduced by the prosecution Man was only present when he was first introduced to PW4 by the informer on 2 February 2000 and also on the next day whereby he took PW4 to Aulong to meet the supplier of the drugs but left him at the bus stop. He later gave the appellant's phone number to PW4. Man was never involved in the negotiation for the sale of the drugs between PW4 and the appellant. On the facts of this case we agreed with the finding of the learned trial judge that an adverse inference could not be drawn against the prosecution because Man was not a material witness in the matrix of the prosecution's case. He was also not an *agent provocateur*. In *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 the Supreme Court held at p 494 that:

> It is essential to appreciate the scope of s 114 illustration (g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

And further:

> In our opinion whether a person is an informer or has become an active agent provocateur would depend on the facts of each particular case. In the instant case the protection under s 40(1) clearly applies since the evidence showed that all the informer did was to accompany DPC Lian on the 14th and introduce him to the appellant. Accordingly there is no merit in the argument that the learned judge ought to have invoked the adverse presumption under s 114(g).

[26] The appellant contended that PW4's evidence as an agent provocateur ought to be corroborated. With respect, this is not a requirement of law and PW4's evidence was admissible pursuant to s 40A(1) of the Act which states as follows:

> Notwithstanding any rule of law or the provisions of this Act or any other written law to the contrary, no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person.

In *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 the Supreme Court held at p 343 that:

> In the case of PW1 it was clear from the facts and surrounding circumstances that he was an agent provocateur. As such, he is protected by the provision of s 40A(1) and (2) of the Act in that he is not presumed to be unworthy of credit and his evidence relating to any attempt to abet or abetment of the offence if done for the purpose of securing evidence against an accused person, is admissible. Similarly, any statement made to him by an accused person shall be admissible at the trial. There is therefore no requirement for the evidence of an agent provocateur to be corroborated.

[27] In his judgment the learned trial judge referred to the decision of this court in *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241; [2003] 2 AMR 404. In that case Gopal Sri Ram JCA, after quoting the judgment of Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, said at p 249 (MLJ) and pp 414–415 (AMR):

> To summarise, the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker. Whether he is a trafficker in those circumstances depend on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into.

A Applying the common sense approach laid down by Lord Diplock in *Ong Ah Chuan*, the learned judge's conclusion that the appellant was guilty of trafficking is abundantly justified.

B **[28]** In the instant case it is clear from the prosecution evidence that the appellant and PW4 had negotiated over the purchase of the cannabis by PW4 whereby they agreed that the price was RM1,500 per kg. No doubt PW4 did not mention the word 'drugs' or 'cannabis' but from the circumstances and the manner the negotiations were made between PW4 and the appellant it could be safely inferred that the appellant was aware that he was negotiating about the C cannabis. It was never suggested to PW4 by the defence that the appellant did not know that the word 'bekalan' meant drugs or cannabis. On the day he was arrested the appellant was transporting the drugs for the purpose of delivering them to PW4. We are satisfied that the learned trial judge had made the correct finding at the conclusion of the case for the prosecution that a prima facie case D against the appellant had been made out.

[29] We now deal with the other ground raised by learned counsel for the appellant. It is his contention that the learned trial judge did not sufficiently E evaluate the appellant's defence before rejecting it. Learned counsel submitted that the learned trial judge erred in law and in facts when he concluded that the appellant did not put forward his defence at the earliest opportunity especially to PW4 that the appellant did not know that the word 'bekalan' referred to drugs or cannabis as he was under the impression that they were dealing with F traditional medicine.

[30] Learned counsel for the appellant also submitted that the learned trial judge had erred in his finding that the appellant could not have sent traditional medicine as early as 6am and hence the defence was an afterthought ('rekaan'). G The learned trial judge should have accepted the appellant's version that he did not know the word 'bekalan' meant cannabis but he understood it as traditional medicine. Learned counsel contended that the learned trial judge should have drawn inferences favourable to the appellant on the meaning of the word 'bekalan'.

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[31] It was also the contention of the appellant that the real trafficker was Dak and not the appellant. The fact that PW4 asked the appellant to contact the supplier was evidence to show the police knew there was someone else other than the appellant. The trap at the Kamunting Toll also suggested that the I police knew and wanted to arrest someone other than the appellant. Dak was later arrested there.

[32] The learned trial judge held that the appellant's defence was an afterthought ('rekaan') and he gave three main reasons for his finding. The

learned trial judge made a finding that the negotiation to purchase the cannabis was made between PW4 and the appellant and Dak was not involved. At pp 22–23 of the appeal record he stated:

> Adalah tidak munasabah SP4 akan bertanya kepada Tertuduh mengenai Dak sedangkan SP4 pun baru mengenali Tertuduh pada malam itu. Bagaimana pula SP4 boleh tahu yang Tertuduh mengenali Dak.
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> Sekiranya SP4 mengenali Dak, apa perlu Dak meminta Tertuduh datang ke Simpang Halt untuk mengambil bekalan untuk disampaikan kepada SP4. Jika Dak mempunyai nombor telefon SP4 adalah lebih mudah untuk Dak menelefon SP4 untuk mengambil terus bekalan darinya.
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> Kesimpulannya adalah, urusan pembelian ganja telah dibuat oleh SP4 dengan Tertuduh tanpa melalui Dak. Tertuduh yang bersetuju dan telah menghantar ganja kepada SP4 pada subuh itu.
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> Saya percaya SP4 tidak mengenali Dak kerana sekiranya polis telah sedia mengenali Dak sudah tentu mereka tidak memerlukan bantuan Tertuduh untuk mengecamkan Dak untuk menangkapnya (Dak) di Simpang Halt. Ini dapat dilihat dari keterangan Tertuduh sendiri yang mengatakan: …

[33] Secondly, the learned trial judge rejected the appellant's defence that the negotiation was made between PW4 and Dak over the phone and the appellant believed that the 'bekalan' was the traditional medicine on the ground that the defence did not put its version to the prosecution's witnesses especially PW4. Thirdly, the learned trial judge disbelieved the appellant after taking into consideration the time of the delivery. At p 26 of the appeal record the learned judge said:

> Tambahan pula sekiranya bekalan yang dihantar oleh Tertuduh adalah hanyalah ubat tradisional (seperti dakwaan Tertuduh) apa perlu penghantaran dibuat seawal 6.00 pagi. Ini satu pembelaan yang tidak dapat diterima akal. Pembelaan ini adalah rekaan Tertuduh sahaja.

[34] We find that the learned trial judge had given a proper evaluation of the evidence of the appellant. He gave his reasons for rejecting the appellant's defence and held that the defence was an afterthought ('rekaan'). Having critically examined the reasons given by the learned trial judge we are in complete agreement with his conclusion that the defence was an afterthought. The learned trial judge believed the evidence of PW4. It is trite law that the credibility of a witness is primarily a matter for the trial judge. In *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 the Federal Court held at p 272 that:

> The credibility of a witness is primarily a matter for the trial judge. There is a homogeneous concatenation of authority on this principle and we refer to the locus classicus on this aspect in a passage in the judgment of Lord Thankerton in *Watt or*

A

Thomas v Thomas [1947] AC 484. The Privy Council said in *Antonio Dias Caldeira v Frederick Augustus Gray* [1936] MLJ 110 that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

B

In *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79 Azmi LP at p 82 said:

C

An appellate court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility. As Lord Diplock had stated in *Tan Chow Soo v Ratna Ammal* [1969] 2 MLJ 49:

D

An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment;

E

[35] We had carefully scrutinised the whole evidence and we were satisfied that there was overwhelming evidence against the appellant and therefore the appellant's conviction could be sustained. For the reasons stated we dismissed

F

the appellant's appeal and affirmed the conviction and sentence passed by the learned trial judge.

Appeal dismissed.

G

Reported by Andrew Christopher Simon

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I